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2 The Foetal Subject

Law, Gender and Embodiment

Michael Thomson

1. Introduction

Reference to embodiment is increasingly visible in legal scholarship, where it is assigned a number of meanings. At times it is employed descriptively to mean the fleshiness of the human condition, indistinguishable from reference to the body or corporeality. Elsewhere, it is used to signify something more than this fleshiness: in part, a challenge to the mind/body split that has haunted legal thought and practice. Finally, for a growing number of legal scholars, it refers to the experience of our corporeality at the intersection of discourses and institutions. While a theoretically richer account of our lives as 'bio-social'[1] beings is impacting on legal scholarship, what embodiment might mean with regard to the specific discourses and institutions of law and legal scholarship is only just beginning to be explored.[2] In response, this chapter sets out to clarify and develop a clear understanding of *legal embodiment*; that is, the particular place of law in processes and practices of embodiment. In doing so, it identifies the body as an important site where law and gender entwine in processes that construct legal subjects.

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[1] E. Grabham, 'Bodily Integrity and the Surgical Management of Intersex' (2012) 18 *Body & Society* 1–26 at 3.

[2] See, for example, M. Thomson, 'A Tale of Two Bodies: The Male Body and Feminist Legal Theory', in M. Fineman (ed.), *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory* (Oxford: Routledge, 2010), 143–156; M. Fox and M. Thomson, 'Bodily Integrity, Embodiment, and the Regulation of Parental Choice' (2017) 44 *Journal of Law & Society* 501–531; C. Dietz, 'Governing Legal Embodiment: On the Limits of Self-Declaration' (2018) 26 *Feminist Legal Studies* 185–204; M. Travis, 'The Vulnerability of Heterosexuality: Consent, Gender Deception and Embodiment' (2019) 28 *Social & Legal Studies* 303–326.

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To fully articulate how we might understand legal embodiment, this chapter addresses changing legal understandings of the foetus – shifting jurisprudential 'fetal imaginings'[3] – and how this shapes the embodied reproductive body. This case study allows an exploration of the particularity of legal discourses and practices, and the need to centre gender in any analytical model focused on the body. Indeed, it starts from the premise that scientific, legal and other discourses that address the body are only intelligible in the context of historically specific understandings of gender.[4] As with the other contributions to this book, gender is positioned as a normative order that produces sex differences and their regulation. Thus, the focus is how, through the body, law and gender co-produce complex legal subjects, hierarchies and identities.[5]

My consideration of the foetal subject begins with the 'foetal heartbeat' bills that have become increasingly visible in the battle over abortion care in the United States. These proposals aim to outlaw abortion care once rhythmic electrical activity is medically detectable in the foetus. This takes place at around six weeks, a point at which many women do not know they are pregnant. This most recent attack on abortion care provides a site where we can examine the role of legal and scientific discourses in embodiment. To fully understand these socio-political processes, the contemporary legal propositions are placed alongside a socio-legal history of *quickening*. Quickening refers to the moment at which the pregnant woman first experiences foetal movement. Historically, it was taken to happen at around fourteen weeks. In the medieval period in Europe, the phenomenon of quickening became overlaid by ecclesiastical doctrine when it was identified with ensoulment: the point at which the soul entered the foetal body. During the nineteenth century in the United Kingdom, the United States, Canada and Australia, an emerging medical profession mobilized foetal identity as part of their professionalization projects.[6] Challenging church authority, and staking moral and epistemic

[3] S. Dubow, *Ourselves Unborn: A History of the Fetus in Modern America* (Oxford: Oxford University Press, 2011), 6.

[4] Thomson, 'A Tale of Two Bodies'. [5] See the Introduction to this volume.

[6] For the United Kingdom, see A. McLaren, *Reproductive Rituals: The Perception of Fertility in Britain from the Sixteenth Century to the Nineteenth Century* (London: Methuen, 1984); J. Keown, *Abortion, Doctors, and the Law* (Cambridge: Cambridge University Press, 1988); M. Thomson, *Reproducing Narrative: Gender, Reproduction and Law* (Dartmouth: Dartmouth Publishing, 1998); M. Thomson, 'Abortion Law and Professional Boundaries'

claims, elite practitioners campaigned against abortion and the legal recognition of quickening, arguing that the foetus had moral status from conception. Competing discourses in the context of the emergence of professional society came to define foetal identity, moral value, and women's reproductive choices and experience. Contemporary legislation focusing on newly detectable electrical activity that indicates the earliest stages of cardiac development is the natural consequence of these early competing discourses that sought to secure epistemic authority by defining foetal identity. As Sara Dubow notes, 'Although multiple and competing fetuses have always coexisted, particular historical circumstances have generated and valorized different stories about the fetus.'[7]

The early disciplinary 'turf wars' that played out over who may define the ethical and legal status of foetal life demonstrate the dynamics of embodiment, both in its broad bio-social meaning and in the specific context of law. Law plays a key role in the construction of bodies. While much work on embodiment has focused on the life sciences, it is important to acknowledge and explore the role of other discourses – including law – in these processes, as 'bodies are produced through networks that fold and cut across science and other fields'.[8] Yet law is not an isolated discipline or practice. Rather, and as these discourses illustrate, law is a domain within which truth claims compete for legitimacy and authority – a process where different disciplinary discourses 'fold and cut across' each other.[9] Law also provides the space within which its own authority is challenged by other domains of knowledge (for example, medicine).[10] In terms of legal embodiment, truth claims that are adopted have enduring effects, as once particular understandings are embedded in law they become sticky:

(2013) 22 *Social & Legal Studies* 191–210. For the United States, see J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800–1900* (New York: Oxford University Press, 1978); K. Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1985); R. Siegel, 'Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection' (1992) 44 *Stanford Law Review* 261–381.

[7] Dubow, *Ourselves Unborn*, 19.

[8] C. Roberts, '"A Matter of Embodied Fact": Sex Hormones and the History of Bodies' (2012) 3 *Feminist Theory* 7–26.

[9] Ibid.

[10] See Thomson, 'Abortion Law and Professional Boundaries'; S. McGuinness and M. Thomson, 'Medicine and Abortion Law: Complicating the Reforming Professions' (2015) 23 *Medical Law Review* 177–199 at 177; S. McGuinness and M. Thomson, 'Conscience, Abortion, and Jurisdiction' (2020) 40 *Oxford Journal of Legal Studies* 819–845 at 819.

privileged, reified and difficult to dislodge. Thus, they play an important role in shaping women's embodied experience of pregnancy and reproductive choices. This exploration of the formation of a modern foetal identity provides the resources to help formulate a rich account of legal embodiment. The aim is to equip us with an analytical lens through which to understand how law and gender, entwined with other disciplinary discourses – most notably the biomedical sciences – shape bodies, embodiment and legal subjects. Starting from the proposition that we experience our embodiment at the intersection of institutional discourses and practices that are specific to time and place, it is proposed that legal embodiment is understood as the role of law in these processes, acknowledging the specificity of law as both a practice and a domain.

The argument is developed in three parts. The chapter starts with the development of approaches to embodiment in feminist scholarship and legal studies. It then considers the foetal subject and starts by addressing 'foetal heartbeat' laws. It locates these within a history of quickening, foregrounding the different disciplinary discourses and institutional interests and practices that compete and become entwined in the processes of defining foetal value, epistemic authority and women's reproductive choices. The medics' ultimate epistemological conquest profoundly shaped gender as the new foetal identity written into law marginalized women's experiences, knowledge and interests. Employing a historical perspective highlights the contingent nature of scientific claims; that is, their historical, social and cultural specificity. This is key to the understanding of legal embodiment developed in this chapter. This approach also acknowledges the importance of history in ethico-legal enquiry,[11] where it can counter the 'abstraction and a-contextuality' of law and the mainstream bioethics that often structures the contours of such work.[12] In the final section, I return to 'foetal heartbeat' legislation to further explore its embodied affects. I do this by addressing the wider context of 'speech and display' provisions and the materiality of rhetoric. Such work on rhetoric can add

[11] M. Thomson, 'Bioethics and Vulnerability: Recasting the Objects of Ethical Concern' (2018) 67 *Emory Law Journal* 1207–1233; McGuinness and Thomson, 'Medicine and Abortion Law'; McGuinness and Thomson, 'Conscience, Abortion, and Jurisdiction'. See also D. Wilson, 'What Can History Do for Bioethics' (2013) 27 *Bioethics* 215–223 at 215.

[12] J. Harrington, 'Time and Space in Medical Law: Building on Valverde's Chronotopes of Law' (2015) 23 *Feminist Legal Studies* 361–367 at 362; Wilson, 'What Can History Do for Bioethics'; McGuinness and Thomson, 'Conscience, Abortion, and Jurisdiction'.

to our understanding of legal embodiment. Conversely, embodiment theory can enrich our understanding of what it means to claim that rhetoric has material consequences.

2. Embodiment

A. The Body and Embodiment in Feminist Theory

While the political and social consequences of differential male and female embodiment provided an important focus for first- and second-wave feminists, the body of their analysis was 'natural' and pre-discursive. Post-structuralist and postmodern feminists, by contrast, have frequently focused on the discursive construction of the body. These scholars have examined the disciplining and production of women's bodies, via gender-normative ideals and (self-)surveillance, in particular through health, bio-medicine, exercise, dieting and fashion.[13] This scholarship points to the ways that biomedical or health regimes and popular culture produce the bodies they seek to regulate.[14] Judith Butler, in particular, challenges the notion that one could ever have access to a pre-discursive biological body. Rather, she argues that descriptions or images of the biological/anatomical body are inherently productive, playing a role in performatively materializing specific (sexed) bodies.[15] These post-structuralist accounts all speak to the importance of social structures, institutions and power relations in the experience of gendered embodiment and a need to deconstruct or reimagine gender norms. The biological functioning of the body itself, however, does not typically play a role in this work. Rather, as Margrit Shildrick states, 'Corporeality is just another construct, and sexual difference is no more stable than gender difference.'[16]

Feminist phenomenologists have focused on the lived body, describing the ways that patriarchal social structures shape lived bodily experiences

[13] See, for example, S. Bordo, *Unbearable Weight: Feminism, Western Culture, and the Body* (Berkeley: University of California Press, 2004); S. L. Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression* (New York: Routledge, 2015).

[14] See, for example, M. Shildrick, *Leaky Bodies and Boundaries: Feminism, Postmodernism and (Bio)Ethics* (London: Psychology Press, 1997).

[15] J. Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (London: Psychology Press, 1993).

[16] Shildrick, *Leaky Bodies and Boundaries*, 175.

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of women, while also valorizing the critical potential of descriptions of women's embodiment.[17] Moira Gatens, for example, directs attention to *bodily imaginaries* as they connect to embodiment, a relationship that is central to the concept of legal embodiment articulated in this chapter. Gatens stresses that it is bodily imaginaries – including those generated in legal discourse and practice – that structures lived experience. An imaginary body, Gatens argues, is 'socially and historically specific in that it is constructed by: a shared language; the shared psychical significance and privileging of various zones of the body (for example, the mouth, the anus, the genitals); and common institutional practices and discourses (for example, medical, juridical and educational) which act on and through the body'.[18] These socially and historically contingent imaginary bodies interrelate with material bodily differences, so that the body itself confirms these expectations of difference expressed in the social order.[19] For Elizabeth Grosz, as for Gatens, sexual bodily differences are constitutive of existence and social relations.[20] Material bodies, nonetheless, cannot be separated from their discursive and social context. Grosz emphasizes the interconnections between the biological (physiological) body, subjectivity and social structures. Experience of the body is neither given completely in itself nor reducible to the social; rather, embodiment requires completion in interaction with the psyche and the world. The 'openness' of the body allows it to respond to the 'social meanings attributed to the body in its concrete historical, social, and cultural particularity'.[21] The account of legal embodiment developed here addresses the role of legal discourse in its particularity. This is meant both in the sense of what is particular to law and legal systems, as well as recognizing the specificity of the changing discourses that play out in legal domains. In *Volatile Bodies*, Grosz stresses that we must be attentive to the ways in which biological sexual difference both precedes and interacts with the social: how women and men are both

[17] See, for example, I. M. Young, *On Female Body Experience: 'Throwing Like a Girl' and Other Essays* (New York: Oxford University Press, 2005), 10.

[18] M. Gatens, *Imaginary Bodies: Ethics, Power and Corporeality* (London: Routledge, 2013), 12. See also G. Weiss, *Body Images: Embodiment as Intercorporeality* (New York: Routledge, 2013).

[19] Gatens, *Imaginary Bodies*, 10.

[20] E. A. Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (St Leonards: Allen & Unwin, 1994).

[21] Ibid., 27.

differently constituted (have different physiological/biological potentialities) and are constituted differently (for example, positioned differently in relation to bodily imaginaries and social structures, and subject to different processes of bodily disciplining).[22] Changing biomedical and legal claims regarding the foetus illustrates this process and the importance of law and legal embodiment within it.

While Grosz and other feminists have focused on the phenomenology of the *lived* body, Donna Haraway has long pointed to the ways that bodies and body parts (cells, embryos, organs and so forth) are socially and materially constructed iteratively within practices of science and technology, which are themselves thoroughly socially and historically inflected yet determinedly material.[23] As Sarah Franklin writes, Haraway demonstrates how it is not possible for 'scientific understandings to escape the interpretive devices, taxonomic conventions or situated and historically specific understandings of how we know anything at all'.[24] Feminist science studies scholars, anthropologists, sociologists and socio-legal scholars have taken up the mantle of analysing the specificities of how (female) bodies and body parts are produced by particular contemporary or historical cultures and scientific practices. As Margrit Shildrick explains:

> The Renaissance anatomists ... who saw the female reproductive organs as homologous to male genitalia, were neither unobservant nor simply bad scientists. The 'truth' they expressed was the truth of their age. This relationship between cultural values and constructions of the body, as part of what Foucault would call the power/knowledge regime, is a symbiotic one.[25]

We continue to see this as body parts have become increasingly isolated, detachable and distributed. Today's Renaissance anatomists might well be those working in the postgenomic field of environmental or social epigenetics. Here, gender is fundamentally shaping the nature and design of laboratory experiments. These experiments then confirm these gendered

[22] Ibid.

[23] D. J. Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (New York: Routledge, 1991).

[24] S. Franklin, 'The Cyborg Embryo: Our Path to Transbiology' (2006) 23 *Theory Culture Society* 167–187 at 178.

[25] Shildrick, *Leaky Bodies and Boundaries*, 15.

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assumptions and become embedded in the scientific claims regarding epigenetic processes and responsibilities that emerge.[26] This extends to the (epi)genetic level the processes whereby bodily differences are always determined in the pre-existing context of gender and, in turn, are used to justify gendered inequalities.[27]

B. Embodiment Theory in Law

It has been argued that socio-legal scholars turned to embodiment in an attempt to recuperate 'the body' in legal studies, where it has often played second fiddle to 'the mind' as the object of concern. Ruth Fletcher argues that engagement with the concept 'emerged from a desire to avoid mind/body dichotomies and to capture the interactive process by which mind and body respond to each other in producing knowledge'.[28] Those legal scholars who were at the forefront of explorations in embodiment theory sought to make sense of this new analytical frame, map nascent socio-legal work, and explore the implications for future legal scholarship.[29] For these scholars, embodiment directs us to attend to how regulation genders the body but also enables us to value the body as the means by which we move through and experience the material world.[30] In this vein, Marie Fox and Therese Murphy have argued that engaging embodiment as an analytical frame mandates 'a broader focus on lived experience and the question of how we inhabit and experience the world through our bodies'.[31] They also highlight the need to engage with the specific power and reach of law, arguing that 'embodiment directs attention to which

[26] S. Lewis and M. Thomson, 'Social Bodies and Social Justice' (2019) 15 *International Journal of Law in Context* 344–361.

[27] As Elizabeth Grosz writes, 'Women's corporeal specificity is used to explain and justify the different (read: unequal) social positions and cognitive abilities of the two sexes. By implication, women's bodies are presumed to be incapable of men's achievements, being weaker, more prone to (hormonal) irregularities, intrusions, and unpredictabilities.' Grosz, *Volatile Bodies*.

[28] R. Fletcher, 'Embodied Practices' (2009) 17 *Feminist Legal Studies* 315–318 at 316–317.

[29] R. Fletcher, M. Fox and J. McCandless, 'Legal Embodiment: Analysing the Body of Healthcare Law' (2008) 16 *Medical Law Review* 321–345 at 335.

[30] Ibid., 321.

[31] M. Fox and T. Murphy, 'The Body, Bodies and Embodiment: Feminist Legal Engagement with Health', in M. Davies and V. E. Munro (eds.), *The Ashgate Research Companion to Feminist Legal Theory* (London: Routledge 2013), 249–268 at 260.

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bodies, and which embodied choices, law values and validates … [I]t requires us to think through the corporeal consequences of legal decision making'.[32]

A number of the themes that can be discerned in this early work have been explored in work I conducted with Marie Fox to develop the concept of embodied integrity.[33] This intervention aims to explain why bodily integrity is increasingly relied upon and to clarify what we really seek to protect when we invoke this fundamental right.[34] In doing so, it provides a robust theoretical conception of this value. The concept of embodied integrity is underpinned by the bio-social body and an understanding that interventions on the body are biographical; that is, they contain the potential to shape future life. Such bodily changes include non-consensual interventions (such as sterilization and genital cutting performed on male and female minors and those born with intersex variations), work done on the adult body as part of the reflexive project of self-identity (for example, cosmetic and modification procedures) or the exercise of reproductive choice.[35] Thus, the body is conceived 'not as an *object* but as an *event*',[36] with bodily integrity a continual process rather than a static state.[37]

The starting point for this work was an exploration of how legal engagement with traditional notions of bodily integrity have been gendered.[38] Thus, while female genital cutting is frequently identified as an infringement of bodily integrity and a human rights abuse, male genital cutting is identified as a parental and religious freedom and invoking bodily integrity is highly controversial.[39] While the history and meaning

[32] Ibid.

[33] M. Fox and M. Thomson, 'Bodily Integrity, Embodiment, and the Regulation of Parental Choice' (2017) 44 *Journal of Law and Society* 501–531; M. Fox, M. Thomson and J. Warburton, 'Non-Therapeutic Male Genital Cutting and Harm: Law, Policy, and Evidence from UK Hospitals' (2019) 33 *Bioethics* 467–474; M. Fox, M. Thomson and J. Warburton 'Embodied Integrity, Shaping Surgeries, and the Profoundly Disabled Child', in C. Dietz, M. Travis and M. Thomson (eds.), *A Jurisprudence of the Body* (Cham: Palgrave, 2020).

[34] Fox and Thomson, 'Bodily Integrity, Embodiment, and the Regulation of Parental Choice'.

[35] A. Giddens, *Modernity and Self Identity* (Cambridge: Polity Press, 1991).

[36] S. Budgeon, 'Identity as an Embodied Event' (2003) 9 *Body & Society* 35–55 at 36.

[37] D. Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (New York: Routledge 1995).

[38] Fox and Thomson, 'Bodily Integrity, Embodiment, and the Regulation of Parental Choice'.

[39] Bodily integrity was recognized in the controversial case in Cologne in 2012: Landgericht Koln (Cologne District Court), Judgment on 7 May [2012] No. 151 Ns 169/11. For discussions of this case and the response of the German government, see G. B. Levey, 'Thinking

of different genital cutting practices is complex and must be acknowledged, it is clear that in responding to genital cutting, law and gender reinforce one another narrating and constituting very different legal subjects. This takes place notwithstanding the fact that in many instances the procedures are equally invasive and involve the loss of analogous tissues.[40] Thus, law in the United Kingdom prohibits all cutting of female genitals whether the individual is a child or adult. In this, adult women are denied the ability to exercise their autonomy over genital cutting in a way that is seen in few other areas. At the same time, no jurisdiction currently outlaws the cutting of male genitals, which – conversely – is a failure to protect male children in a way seen with no other non-therapeutic intervention of this order.[41] Here we see familiar gender tropes intertwining with law, and indeed frequently bolstered by biomedical knowledge claims. Thus, women need higher levels of surveillance and protection, and are – at times – deemed incapable of decision-making regarding their own bodies. We see this elsewhere in the contexts of sex and reproduction, including abortion care, as discussed below. Men's bodies, in contrast, are safe, bounded, invulnerable.[42] Pain is a marginal concern and may, in fact, be constitutive of a robust masculinity.[43] Men exercise dominion over their bodies; replaying a tenacious and gendered mind/body split. Thus, law and gender scaffold each other, and result in different responses to risk, embodied choices and legal subjects. This chimes with Grosz's assertion that women and men are both *differently constituted* (physiological and biological) and *constituted differently* (positioned differently in relation to social structures and processes of bodily disciplining).[44]

about Infant Male Circumcision after the Cologne Court Decision' (2013) 3 *Global Discourse* 326–331; S. R. Munzer, 'Secularization, Anti-Minority Sentiment, and Cultural Norms in the German Circumcision Controversy' (2015) 37 *University of Pennsylvania Journal of International Law* 503–582.

[40] Fox and Thomson, 'Bodily Integrity, Embodiment, and the Regulation of Parental Choice'; B. Earp, J. Hendry and M. Thomson, 'Reason and Paradox in Medical and Family Law: Shaping Children's Bodies' (2017) 25 *Medical Law Review* 604–627.

[41] Some may contend that ear piercing or otoplasty (ear pinning) are analogous and lawful but this would fail to account for the functional and erogenous nature of the tissue removed in male genital cutting and the risks involved.

[42] N. Naffine, 'The Body Bag', in N. Naffine and R. Owens (eds.), *Sexing the Subject of Law* (London: Law Book Company, 1997); M. Thomson, *Endowed: Regulating the Male Sexed Body* (London: Routledge, 2007).

[43] Naffine, 'The Body Bag'; Thomson, *Endowed*.

[44] Grosz, *Volatile Bodies*.

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Work that has sought to track and develop the emerging work on embodiment in legal studies is important. It maps where we have been and the implications of embodiment theory for legal studies. Yet it is questionable the degree to which this work has detailed a specifically *legal* embodiment or reflect the dynamic and affective nature of embodiment detailed by Gatens, or captured by Rosemary Garland-Thomson when she describes embodiment as the 'dynamic encounter between flesh and the world'.[45] However, two more recent interventions in the development of legal thinking around embodiment provide a stronger focus on the institutional and affective dimensions of embodiment. Both attend to questions of the relationship between law, gender and the body.

In his response to a contemporary re-emergence of law's concern with 'deception as to gender', Mitch Travis defines embodiment as 'the material experience of the body and its relationships with both discourse and institutions'.[46] Travis underscores the importance of attending to institutions, arguing that they 'not only shape the material experience of the subject but also structure the possibilities, potential and emergence of our corporeal selves ... [I]nstitutions contribute to, create and construct our embodiment and restrict the ways in which bodies and identities can be understood'.[47]

Drawing on his work on intersex and non-normative embodiment,[48] Travis explores the ways in which 'law, medicine, culture and society' determine our bodies and embodied experiences. This is particularly apparent with those whose corporeality 'fall[s] outside of traditional sex or gender categories as it highlights the difficulties in decoupling material experiences from their legal and medical contexts'.[49] Reference to medicine is important and Travis's focus on 'institutions' means we do not privilege law over other domains. This is particularly important when we acknowledge the role of medicine and the biomedical sciences in the

[45] R. Garland-Thomson, 'Misfits: A Feminist Materialist Disability Concept' (2011) 26 *Hypatia* 591–609.

[46] Travis, 'The Vulnerability of Heterosexuality'. [47] Ibid., 323.

[48] F. Garland and M. Travis, 'Legislating Intersex Equality: Building the Resilience of Intersex People through Law' (2018) 38 *Legal Studies* 587–606; M. Travis, 'Accommodating Intersexuality in European Union Anti-Discrimination Law' (2015) 21 *European Law Journal* 180–199; M. Travis, 'Non-Normative Bodies, Rationality, and Legal Personhood' (2014) 22 *Medical Law Review* 526–547.

[49] Travis, 'The Vulnerability of Heterosexuality', 306.

processes of embodiment. As Margaret Lock and Vinh-Kim Nguyen assert, biological facts 'are technophenomena that constitute only a partial view of reality',[50] yet they shape 'how the self is made "real"'.[51] Thus, assemblages of biomedical, medico-legal and other discourses provide for the emergence of particular bodies and identities.

While Travis encourages us to focus on the role of institutions in processes of embodiment, Chris Dietz narrows this to law without losing sight of the importance of this wider framing. Dietz's consideration of embodiment starts by acknowledging that this focus has moved us 'beyond the question of how bodies are produced by discourse, to consider affective aspects of regulation'.[52] He articulates legal embodiment in the following terms: 'If embodiment is understood as the moment when ontology (what I am) meets epistemology (how I identify and am identified), [legal embodiment] addresses the specifically institutional effects of such processes.'[53] As he continues, when institutional regulations coalesce, they have a significant impact on the practices of embodiment, and, echoing Garland-Thomson's 'dynamic encounter',[54] this process is iterative. So, for Dietz, legal embodiment is an 'ongoing process which produces normative bodies and behaviours, and shapes the conditions and possibilities for embodied resistance'.[55] This chimes with Budgeon's argument that the body is not a representational object but rather an event, emerging 'within the context of a multiplicity of practices and regimes'.[56]

The acknowledgement in embodiment theory of the importance of institutions must address the specificity of law, in the same way that attention has been directed towards biomedical discourses.[57] While feminist and other critical literatures have long recognized the limits of law,[58] it nevertheless has particular authority and power. It defines the legitimate and illegitimate and has the power to authorize other institutions, conferring authority and jurisdiction.[59] This requires that we pay particular attention

[50] M. Lock and V. Nguyen, *An Anthropology of Biomedicine* (Hoboken, NJ: John Wiley & Sons, 2018), 109.
[51] Ibid., 284. [52] Dietz, 'Governing Legal Embodiment', 87. [53] Ibid., 186. [54] Ibid.
[55] Ibid., 186–187. [56] Budgeon, 'Identity as an Embodied Event', 52.
[57] Lock and Nguyen, *An Anthropology of Biomedicine*.
[58] See, for example, C. Smart, *Feminism and the Power of Law* (New York: Routledge, 1989).
[59] McGuinness and Thomson, 'Conscience, Abortion, and Jurisdiction'.

to the discourses that are played out in the legal domain, as competing truth claims are directly tied to claims to power.

The more recent contributions to legal literature on embodiment direct us to consider institutional and affective dimensions. They move us 'beyond the discursive realm to address how governing processes saturate bodies with meaning' and its affect.[60] In building upon this, I bring this institutional focus together with attention to the historical, social and cultural specificity and contingency of knowledge claims. I propose that *legal embodiment* be understood as the role that legal discourses and practices play, when we experience our embodiment at the intersection of discourses and institutional practices that are specific to time and place. I join the growing calls for methods from history, anthropology, science and technology studies, and critical rhetorical studies to have a more prominent place in health law,[61] where the body is too often left uncontested and unchallenged 'in the "natural" realm of biology'.[62] Understanding and challenging the socio-political foundations of embodiment requires that the 'natural' realm be subject to critical scrutiny, particularly in addressing how gender becomes naturalized within biological and biomedical discourses which then become embedded in law. As Sarah Franklin notes in response to Donna Haraway's early work on embryology, and foreshadowing the section that follows, 'we cannot even look at the embryo – objectively, scientifically, in the laboratory, under a microscope – without seeing it through the lens of our own, pre-fabricated, culturally inherited, ubiquitous, constitutive, real and inescapable frames of reference'.[63]

As feminist science and technology scholars and others have demonstrated time and again, these 'inescapable frames of reference' include gender. Acknowledging the foetus as a site where gender as a normative order is enacted, I turn next to the foetal subject, emphasizing the shifting and contested claims made within the legal domain and the implications of

[60] Dietz, 'Governing Legal Embodiment', 194.

[61] Fox and Murphy, 'The Body, Bodies and Embodiment'; J. Edwards and M. Thomson, 'Provincialising the Clitoris', in M. Jacob and A. Kirkland (eds.), *Research Handbook on Socio-Legal Studies, Medicine and Health* (Cheltenham: Edward Elgar, 2020).

[62] Dietz, 'Governing Legal Embodiment', 198–199, citations omitted.

[63] S. Franklin, 'The Cyborg Embryo: Our Path to Transbiology' (2006) 23 *Theory Culture Society* 167–187 at 178.

these. While feminist legal scholars have done much to interrogate and map the foetuses of the legal imagination,[64] the focus here, rather, are the discursive processes that enable law to imagine and enact the foetus in different ways.

3. The Foetal Subject

A. 'Foetal Heartbeat' Laws

At the time this chapter was begun, the focus of US abortion politics was Georgia. In May 2019 Governor Brian Kemp signed into law one of the most restrictive abortion provisions in the United States. Georgia House Bill 481, the Living Infants Fairness and Equality (LIFE) Act, prohibited the termination of a pregnancy once a 'foetal heartbeat' was medically detectable, taken to be six weeks from conception.[65] Although Georgia was the fourth state that year to introduce such legislation – after Kentucky, Mississippi and Ohio – it attracted greater media attention. While 'foetal heartbeat' laws have recently attracted heightened attention, they first emerged in 2011 when Ohio House Bill 125 was introduced but failed to pass.[66] At the time of Kemp's signing, at least sixteen states were

[64] See, for example, I. Karpin, 'The Uncanny Embryos: Legal Limits to the Human and Reproduction without Women' (2006) 28 *Sydney Law Review* 599–623; I Karpin, 'Taking Care of the Health of the Preconceived Embryos or Constructing Legal Harm', in J. Nisker, F. Baylis, I. Karpin, C. McLeod and R. Mykitiuk (eds.), *The 'Healthy' Embryo: Social, Biomedical, Legal and Philosophical Perspectives* (Cambridge: Cambridge University Press, 2010); I. Karpin, 'The Legal and Relational Identity of the "Not-Yet" Generation' (2012) 4 *Law, Innovation and Technology* 122–143; S. McGuinness, 'The Construction of the Embryo and Implications for Law', in M. Quigley, S. Chan and J. Harris (eds.), *Stem Cells: New Frontiers in Science and Ethics* (Singapore: World Scientific Publishing Co., 2015); M. Fox and S. McGuinness, 'The Politics of Muddling Through: Categorising Embryos', in C. Stanton, A.-M. Farrell, S. Devanney and A. Mullock (eds.), *Pioneering Healthcare Law: Essays in Honour of the Work of Margaret Brazier* (New York: Routledge, 2016).

[65] For a detailed discussion of the Bill and its political and legal context, see B. A. Sizemore, 'Under Kemp's Eye: Analyzing the Constitutionality of the Heartbeat Restriction in Georgia's LIFE Act and Its Potential Impact on Abortion Law' (2019) 71 *Mercer Law Review* 417–442.

[66] A similar provision, House Bill 248 was introduced in 2013, but failed on the House floor in December 2014. Ohio's third attempt was successful in 2019.

considering similar restrictions on abortion care.[67] The Georgia bill was due to come into effect on 1 January 2020. It was temporarily blocked by a federal judge on 1 October 2019, and declared unconstitutional on 13 July 2020.[68] By this date, almost 100 'foetal heartbeat' laws had been introduced to legislatures in twenty-five states.[69]

By the time this collection was moving towards production, Texas and its 'foetal heartbeat' law – Senate Bill 8 – was the focus. Similar in many regards, Texas SB 8 offered the novel addition that rather than authorize state officials to enforce the Act, it 'deputizes ordinary citizens as bounty hunters'.[70] Under this scheme, citizens can recover damages of $10,000 plus legal costs by suing anyone who provides an abortion in contravention of the Act, 'aids or abets' such a termination, or intends to do so. Both the Georgia and Texas legislation were introduced notwithstanding that all other 'foetal heartbeat' legislation has been deemed unconstitutional. These rulings recognize that proscribing abortion care before the third trimester is in direct contravention of the constitutional protections provided by *Roe* v. *Wade*[71] and *Planned Parenthood* v. *Casey*.[72] Specifically, in *Roe*, the Supreme Court recognized viability as the earliest point at which a state's interest in foetal life may permit an absolute prohibition on the performance of an abortion.[73] In *Casey* in 1992, the court upheld Roe, restating that a state may not prohibit a woman 'from making the ultimate decision to terminate her pregnancy before viability'.[74] Nevertheless, the court asserted that states have a legitimate interest before viability in protecting the health of the woman and the life of the foetus, and this may justify regulations that do not place an undue burden on a woman's ability to obtain abortion care.[75] An 'undue burden' exists if the purpose or

[67] D. P. Evans and S. Narasimhan, 'A Narrative Analysis of Anti-Abortion Testimony and Legislative Debate Relating to Georgia's Fetal "Heartbeat" Abortion Ban' (2020) 28 *Sexual and Reproductive Health Matters* 1–17 at 2.

[68] 'US Judge Blocks Georgia Abortion Ban', *The Guardian*, 14 July 2020, www.theguardian.com/us-news/2020/jul/13/us-judge-blocks-georgia-abortion-ban.

[69] Evans and Narasimhan, 'A Narrative Analysis of Anti-Abortion Testimony'.

[70] *United States* v. *Texas* 595 US (2021), at 2.

[71] *Roe* v. *Wade* 410 US 113 (1973).

[72] *Planned Parenthood* v. *Casey* 505 US 833 (1992).

[73] The court indicated that viability 'is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks'. *Roe* v. *Wade* at 160.

[74] *Planned Parenthood* v. *Casey* at 879.

[75] The right of states identified in *Casey* to regulate to protect the health of the woman and the foetus before viability has resulted in a significant number of Targeted Regulation of Abortion Providers (TRAP) laws. These seek to indirectly limit access to abortion through

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effect of a regulation is 'to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability'.[76] Before viability, 'the state's interests are not strong enough to support a prohibition of abortion'.[77] This has been upheld in a number of decisions since *Casey*,[78] including in response to 'foetal heartbeat' legislation. In *EMW Women's Surgical Center* v. *Beshear*, for example, the federal district court held the Kentucky 'foetal heartbeat' law unconstitutional, noting that the Supreme Court in *Casey* 'stated in no uncertain terms that regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability'.[79]

The proliferation of such legislative interventions has been motivated in part by the hope that one will lead to a Supreme Court reconsideration of *Roe* and *Casey*. The writing of deliberately unconstitutional bills accelerated in response to the appointment of Justices Brett Kavanaugh and Amy Coney Barrett to the Supreme Court. Georgia Governor Kemp at a signing ceremony at the State Capitol stated that his administration was preparing for a court fight: 'Our job is to do what is right, not what is easy. We are called to be strong and courageous, and we will not back down.'[80]

regulation. They have resulted in the closure of clinics across the United States. In 2019, six states had only one clinic offering abortion care. W. Arey, 'Web Roundup: Abortion Bans, Heartbeat Bills and the Future of Roe v Wade', *Somatosphere*, 28 June 2019, http://somatosphere.net/2019/web-roundup-abortion-bans-heartbeat-bills-and-the-future-of-roe-v-wade.html/

[76] *Planned Parenthood* v. *Casey* at 925. [77] Ibid.

[78] 'Beginning in 2013, the US Courts of Appeals for the Eighth and Ninth Circuits have respectively invalidated state laws in Arizona, Arkansas, Idaho, and North Dakota prohibiting the performance of an abortion once a fetus has reached a gestational age younger than 24 weeks. In their decisions, the two appellate courts have cited the *Casey* plurality's determination that a state may not prohibit a woman from having an abortion before a fetus attains viability'. J. O. Shimabukuro, 'Reviewing Recently Enacted State Abortion Laws and Resulting Litigation', Congressional Research Service: Legal Sidebar, 6 September 2019, p. 2. Thus, in *McCormack* v. *Herzog* the Ninth Circuit struck down Idaho's Pain-Capable Unborn Child Protection Act, which prohibited terminations after a gestational age of twenty weeks. The statute applied regardless of viability: '[T]he broader effect of the statute is a categorical ban on all actions between twenty weeks gestational age and viability. This is contrary to the Court's central holding in *Casey* that a woman has the right to "choose to have an abortion before viability and to obtain it without undue interference from the State".'

[79] *EMW Women's Surgical Center* v. *Beshear* 920 F.3d 421 (6th Cir. 2019).

[80] P. Mazzei and A. Binder, 'Georgia Governor Signs "Fetal Heartbeat" Abortion Law', *The New York Times*, 7 May 2019.

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Similarly, Alabama introduced a bill that would ban abortion outright. House Bill 314, approved by the State House of Representatives, provided no exemption for rape or incest and a doctor providing such health care would in most instances face up to ninety-nine years in prison. State Representative Rich Wingo, a supporter of the bill, stated: 'House Bill 314 goes directly after Roe. We're trying to keep the bill as clean and direct so there's not any ambiguity.'[81]

Texas SB 8 is similarly written to drive a challenge to a Supreme Court that has become more critical of *Roe* v. *Wade*. This is seen not only in its 'near categorical ban' on abortion care after six weeks, but also its attempt to restrict constitutional and procedural defences by moving enforcement from state officials to private citizens. On 1 September 2021 – the day SB 8 took effect – and in response to an action led by the Center for Reproductive Rights, the Supreme Court refused to enjoin the Act, citing 'complex and novel' procedural questions about whether it had authority to do so.[82] On 22 October, and following a challenge by the Department of Justice, it agreed to hear the case on 1 November 2021 – a significantly expedited timeframe – but again refused to block the application of the legislation until the case was heard.[83] As Justice Sotomayor noted in dissenting from the decision to refuse such action in the face of a 'patently unconstitutional' provision:

> There is no dispute that under this court's precedents, women have a constitutional right to seek abortion care prior to viability . . . S.B.8 was created to frustrate that right by raising seemingly novel procedural issues, and it has had precisely that effect. Under such unique circumstances, the equities plainly favour administrative relief while this Court sorts out these issues.[84]

The impact has been 'catastrophic'. As Sotomayor noted in her dissent, 'the State (empowered by this Court's inaction) has so thoroughly chilled the exercise of the right recognised in *Roe* as to nearly suspend it within its borders and strain access to it in other States'.[85] The Supreme Court will hear both cases together. A challenge to legislation in Mississippi that bans abortion after fifteen weeks is also scheduled to be heard in December.[86]

[81] Ibid.
[82] *Whole Woman's Health* v. *Jackson* 594 US (2021). See also https://reproductiverights.org/case/texas-abortion-ban-whole-womans-health-jackson/.
[83] *United States* v. *Texas* (2021). [84] Ibid., 7. [85] Ibid., 6.
[86] *Dobbs* v. *Jackson Women's Health Organization* (2020) 19-1392.

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Many expect the Supreme Court to overturn or restrict *Roe* v. *Wade*. It is believed that this would lead to restrictive legislation in more than half of states. Overturning *Roe* would see 'trigger' legislation in twelve states come into effect, banning abortion outright.[87] These developments would have a devastating effect on reproductive rights and justice in the United States, with effects felt further afield. While this is an extraordinarily important moment for abortion law and women's rights in the United States, the focus here is on the embodied effects of these legislative discourses. These effects will be felt regardless of the ultimate deliberations of the Supreme Court. With the legislative interventions framed around 'foetal heartbeat', there is a clear aim to disrupt thinking around foetal viability and personhood. While this is directed at restricting legal access to essential health care, it should also be understood in the context of an entangling of biological matter with discourses and institutional practices that generate embodied subjects. To better understand this and what is at stake, I turn now to the early origins of our modern foetal identity.

B. A Socio-Legal History of Quickening

In her discussion of the 'foetal heartbeat' laws, Lois Shepherd argues that they will have an impact because they are 'cloaked in the language of science and medicine, replete with references to esteemed professional organizations and widely accepted laws'.[88] Shepherd is correct to highlight the potential force and impact of this co-mingling of scientific claims, legal propositions and professional authority – a constellation now explored with an earlier mixing of human reproductive material and biomedical claims. This section details the emergence of medical knowledge claims regarding the beginning of life, providing a socio-legal history of the life and death of quickening. The wider social history of quickening is long and contested.[89] The focus here is limited to law, specifically how medicine came to define foetal identity in law 'through

[87] https://maps.reproductiverights.org/what-if-roe-fell

[88] L. Shepherd, 'Fetal Heartbeat Bill Gets the Science and the Law Wrong' *Jurist*, 21 March 2019.

[89] For an account of this longer history, see M. S. Scott, 'Quickening in the Common Law: The Legal Precedent *Roe* Attempted and Failed to Use' (1996) 1 *Michigan Law & Policy Review* 199–268.

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the intersection of technique and ideology'.[90] This was motivated, in part, by the desire of elite members of the profession to secure control over the domain of health by expelling competing health providers. Through this, biomedicine came to define the social and legal truth of foetal life. This has shaped public discourse, women's reproductive choices, embodied experiences and gender.

The origins of the quickening doctrine sit with Aristotle, who claimed that life began when sperm was nourished by the woman's uterine blood. Early life – compared to a wakening seed – was supported by a vegetative soul. This was replaced by a 'sensitive' soul that allowed animal life to begin, and finally the 'rational' soul: 'the life-principle that enables matter to become a man in actuality'.[91] For Aristotle, quickening happened for male foetuses at around forty days, but not until eighty days for females. The entry of the rational soul animated the foetus, resulting in movement or quickening. While evident in Catholic teaching since at least the third century, quickening was confirmed as Catholic dogma in 1312, with the Council of Vienne adopting St Thomas Aquinas' endorsement of Aristotle's theory.[92] While Aquinas accepted the theory of 'delayed hominization',[93] he claimed that ensoulment happened for both sexes at around forty days. Thus, for ecclesiastical doctrine and law, woman's first experience of foetal movement denoted the entry of the soul.[94] As such, quickening can be understood as an overlay by natural philosophy and then ecclesiastical doctrine of what had previously structured women's experience of pregnancy; an earlier claim to truth. Aquinas' position was adopted by European common law courts and subsequently exported to colonial jurisdictions, such as the United States and Australia,[95] by British colonial law. Few records exist of prosecutions,[96] with the crime regarded as a matter for the ecclesiastical courts because of its association with magic

[90] Dubow, *Ourselves Unborn*.

[91] N. M. Ford, *When Did I Begin? Conception of the Human Individual in History, Philosophy and Science* (Cambridge: Cambridge University Press, 1988), 35.

[92] Dubow, *Ourselves Unborn*. [93] Ibid.

[94] This was widely taken to happen at fourteen weeks after conception.

[95] L. Featherstone, 'Becoming a Baby? The Foetus in Late Nineteenth-Century Australia' (2008) 23 *Australian Feminist Studies* 451–465 at 451.

[96] There is, however, reliance on the quickening doctrine in tort cases where pregnant women brought actions against people who assaulted them, causing the loss of the foetus. Spivak argues that it is these cases that have led to some erroneous statements regarding the status of abortion in law in the medieval and early modern periods. See C. Spivak, 'To "Bring

and sorcery.[97] Nevertheless, Aristotle's theory remained largely unchallenged for nearly 2,000 years.[98]

Historical accounts of the changing social and legal status of abortion are, of course, political interventions. While there are rare claims that abortion has always been a significant concern of the criminal law,[99] the prevailing view is that before the beginning of the nineteenth century abortion was a crime – a common-law misdemeanour – only if it took place after quickening.[100] Such accounts wrestle with both the complexity of thought[101] and legal systems[102] in the medieval and early modern periods to conclude that the quickening doctrine was 'long embedded in the common law'.[103] Thus, writing in the thirteenth century – the point at which laws concerning pregnancy and childbirth became more prevalent[104] – Henry de Bracton stated that in English common law: 'If there

Down the Flowers": The Cultural Context of Abortion Law in Early Modern England' (2007) 14 *William and Mary Journal of Women and the Law* 107–151.

97 D.S. Davies, 'The Law of Abortion and Necessity' (1938) 2 *Modern Law Review* 126–138 at 132; B. Dickens, *Abortion and the Law* (Bristol: MacGibbon and Kee, 1966).

98 C. Cameron and R. Williamson, 'In the World of Dolly, When Does a Human Embryo Acquire Respect?' (2005) 31 *Journal of Medical Ethics* 215–220 at 215.

99 See, for example, J. W. Dellapenna, *Dispelling the Myths of Abortion History* (Durham, NC: Carolina Academic Press, 2006). Joseph Dellapenna's book challenges the historical account of abortion in American law that is articulated by Justice Blackmun in *Roe* v. *Wade* (1973). Dellapenna's account is robustly challenged by Spivak, 'To "Bring Down the Flowers"'.

100 'The quickening doctrine itself appears to have entered the British common law tradition by way of the tangled disputes of medieval theologians over whether or not an impregnated ovum possessed a soul. The upshot was that . . . women in 1800 were legally free to attempt to terminate a condition that might turn out to have been a pregnancy until the existence of that pregnancy was incontrovertibly confirmed by the perception of fetal movement.' Mohr, *Abortion in America*, 4. For an account of the later historical period, see R. Solinger, *The Abortionist: A Woman against the Law* (Berkeley: University of California Press, 1994).

101 For an account of differing attitudes to abortion during the medieval periods see L. Harris, 'Old Ideas for a New Debate: Medieval and Modern Attitudes to Abortion' (2017) 53 *Medieval Feminist Forum: A Journal of Gender and Sexuality* 131–149; Spivak, 'To "Bring Down the Flowers"'.

102 As Spivak writes, 'Part of the reason for this very real confusion is that medieval and early modern England did not have a single unified legal system, though one was evolving: law was still partly related to local custom and could vary from place to place; multiple court systems were in play; ecclesiastical law and common law had contested and at times overlapping jurisdictions.' Ibid., at 109-110.

103 P. Gajdusek, 'Quickening Doctrine' (2003) 5 *Common Law Review* 23–25.

104 Fiona Harris-Stoertz argues that such laws became more prevalent in the twelfth and thirteenth centuries, representing the '"thin end of the opening wedge" of male control of

is anyone who strikes a pregnant woman or gives her a poison which produces an abortion, if the foetus be already formed or animated, and especially if animated, he commits homicide.'[105]

By the end of the eighteenth century, elite regular physicians came to oppose the legal position on abortion. In this, the first legislative responses to abortion at the beginning of the nineteenth century have been tied to the campaign launched by the university-educated ('regular') physicians as part of their processes of professionalization.[106] As Lynn Morgan argues, 'embryos do not take their meanings from immanent qualities. Embryos do not themselves pose conundrums or create disputes; rather, social controversies provide the interpretive lenses through which embryos are imbued with meaning'.[107] Central to the physician's campaign was a claim to scientific knowledge regarding embryonic and foetal life that was not shared by competing practitioners: the midwives, herbalists, apothecaries and so forth. Thus, opposition was a tool for professional advancement, a rare (perhaps singular[108]) means for the regular physicians to seek to legally distinguish themselves from their competitors.

In the eighteenth century, physicians, surgeons and apothecaries worked in the guild structure. The guilds were responsible for teaching, and exerted some control over conduct and practice. While they set parameters for the practice of their members, they could not prescribe other models of health care. As such, the regular physicians worked in competition with folk, lay and other practitioners. As Peterson writes: 'Quacks, "empirics", and drug peddlers' practised freely and outside of possible legal sanctions, 'while a physician in London could be disciplined by his college for preparing and

pregnancy and childbirth and helped pave the way for the greater loss of female hegemony in later centuries'. F. Harris-Stoertz, 'Pregnancy and Childbirth in Twelfth- and Thirteenth-Century French and English Law' (2012) 21 *Journal of the History of Sexuality* 263–281.

[105] H. de Bracton, *On the Laws and Customs of England*, trans. S. E. Thorne, 4 vols. (Cambridge, MA: Belknap Press, 1968), vol. II.

[106] Thomson, *Reproducing Narrative*.

[107] L. Morgan, 'Embryo Tales', in S. Franklin and M. Lock (eds.), *Rethinking Life and Death: Toward an Anthropology of the Biosciences* (Santa Fe, CA: School of American Research Press, 2003), 262.

[108] Mohr argues that the physicians' inability to effectively treat the ills of the day left them with few other ways of distinguishing themselves from competing providers. Mohr, *Abortion in America*.

selling a prescription to his patient'.[109] As Peterson concludes, the provision of medicine in the eighteenth and early nineteenth century was 'near chaos'.[110] The method by which the regular physicians addressed this chaos, harnessing the issue of abortion to gradually criminalize the activities of their competitors and gain occupational closure is well documented.[111] As Reva Siegel writes of the US history: 'Men interested in establishing their professional authority ... encouraged other men to assert their political authority over women's role in reproduction by criminalizing the means of controlling birth, each acting to preserve life in the social order as they knew it.'[112]

In this process, campaigning elites 'presented the protection of unborn life as a means to various social goals as much as an end in its own right'.[113] A similar history is evident in the United Kingdom, where physicians, in their campaign to criminalize abortion and abortionists, 'corporealized the preoccupations of civic governance and their own parochial professional concerns'.[114] This saw the female body become the 'repository for social concerns, contemporary anxieties, and the professional aspirations of medicine'.[115] As Angus McLaren observes, while our collective memory attributes changes in abortion law to religious sentiment, scientific insights and developing regard for children, 'significant, also, were the pragmatic concerns and professional interests of lawyers and doctors seeking to implement laws that would best serve their needs'.[116]

Following successful lobbying by elite regular physicians in the United Kingdom, Lord Ellenborough's Act 1803 provided for a statutory crime of abortion for the first time. However, this Act inscribed the quickening doctrine into statute. Before quickening, abortion was punishable by a fine, corporal punishment, imprisonment or transportation for up to fourteen years. Aborting a quickened foetus was punishable by death. Lord Ellenborough's Act had an influence beyond English law with the first US anti-abortion statute based on the 1803 legislation.[117] In response to statutory entrenchment of the ecclesiastical doctrine, the years that

[109] M. J. Peterson, *The Medical Profession in Mid-Victorian* (Berkeley: University of California Press, 1978), 5.
[110] Ibid. [111] See references in fn. 6. [112] Siegel, 'Reasoning from the Body', 318.
[113] Ibid., 315. [114] Thomson, *Reproducing Narrative*, 10. [115] Ibid.
[116] McLaren, *Reproductive Rituals*, 144. [117] Gajdusek, 'Quickening Doctrine', 24.

followed saw growing medical opposition to quickening as a site of disciplinary or jurisdictional conflict. This opposition relied on alternative claims that (morally significant) life began at conception, not quickening. Again, we should not think that embryos and foetuses existed, pre-formed with meaning, awaiting to be discovered and mobilized. As the anthropologist Lynn Morgan writes, foetuses only exist in the context of a constellation of relations 'that includes those who bought them into social being'.[118] In this, foetuses are material and social products that the emerging field of embryology gave a particular meaning and value. The early embryologists took what had previously been unremarkable human waste, and in changing its meaning and value, created their own professional identity:

> By producing visible evidence of the embryo's contours and dimensions, the embryologists set the stage for major epistemological and ideological shifts. They claimed human gestational development as a biomedical enterprise, the embryo itself as a neutral biological product, embryo collecting as a valuable, legal and ethically justifiable enterprise, and themselves as experts in a new professional speciality.[119]

The physicians harnessed this new meaning to their own professionalization project. Significantly, while the physicians reacted against ecclesiastical encroachment on what was now perceived as within the medical domain, they also opposed a model of foetal life that allowed the pregnant woman to usurp medical expertise.[120] Quickening allowed the pregnant woman to define when life became morally and legally relevant. As such, it was a site of struggle over who knew the truth of pregnancy – woman, church or medicine – and this struggle (for jurisdiction or authority) took place in the realm of law. Medicine's success saw women's knowledge and experience marginalized. This process continued with the development of embryology as a discipline,[121] and the emergence of technologies that

[118] L. M. Morgan, *Icons of Life: A Cultural History of Human Embryos* (Berkeley: University of California Press, 2009), 16.

[119] Morgan, 'Embryo Tales', 263. [120] McLaren, *Reproductive Rituals*, 139.

[121] See Lynn Morgan's observation on the work of the early embryologists and the emergence of human embryology as a discipline: 'They created a new vocabulary that alienated embryological "specimens" from their origins in women's lives. They cast alternative forms of pregnancy knowledge – such as that produced by women and midwives – as insignificant, superstitious, or wrong . . . The work they did resulted in the consolidation of embryological knowledge, as well as the embryos themselves, within a powerful and

visualize the foetus,[122] as well as those that assist reproduction in increasingly complex configurations.[123]

These early claims to know the truth of foetal identity, usurping experiential and ecclesiastical knowledge claims, were part of medicine's successful project to assert dominion over life. Morgan claims that there is a reciprocal relationship between foetuses as socially constituted entities and 'the societies that produce them that affects and changes both sides'.[124] The elite regular physician's 'bio-theological' discourse created a 'new political identity for the foetus'[125] that has shaped how we continue to discuss, understand and experience the foetus. As such, it created the conditions of possibility for the 'foetal heartbeat' laws and the wider 'pro-life is pro-science' political strategy. In other words, this professionalization strategy had immediate effects on women's (legal) reproductive choices but also a longer and perhaps more profound effect on processes of embodiment, as science succeeded in its right to define the meaning and value of reproduction and life itself. The new foetal identity entrenched particular understandings of female reproductive function and gender in law, and through processes of legal embodiment impacted all female subjects.

The Offences Against the Person Act 1837 removed the ecclesiastical distinction marking the legal death of quickening, although it remained part of Catholic dogma until 1869.[126] In the United States, while states had previously adopted a 'cautious, ambiguous, or defensive attitude to abortion',[127] the medical profession saw some success in changing state laws in the first half of the nineteenth century. This intensified after the formation of the American Medical Association in 1847. By the end of the century, there were anti-abortion statutes in every state.[128] As Gajdusek writes, these laws address a range of disparate concerns, including market competition and challenges to traditional gender roles:

tenacious biomedical context.' 'Embryo Tales', 268. Further: '[T]he embryologists granted themselves the prerogative of animating the embryos and deciding what they had to say.' Ibid.

[122] See, for example, B. Katz Rothman, *The Tentative Pregnancy: Prenatal Diagnosis and the Future of Motherhood* (New York: Viking, 1986).

[123] Isabel Karpin argues that the female body has disappeared in both the IVF clinic and the regulation that governs the activities of such clinics, see Karpin, 'The Uncanny Embryos'.

[124] Morgan, 'Embryo Tales', 16. [125] Dubow, *Ourselves Unborn*, 20. [126] Ibid., 19.

[127] Mohr, *Abortion in America*, 224. [128] Gajdusek, 'Quickening Doctrine'.

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The new laws were a triumph for physicians now fully invested with scientific authority. Midwives and 'irregular' doctors were excluded as legitimate abortion practitioners, and the women-centred 'quickening' doctrine was abandoned. The new laws were sharply moralistic. For example, they deepened the stigma attached to abortion by associating it with 'obscenity'. In addition the laws reflected a triumph for sexual conservatism and medical doctors' determination to block middle-class women from employing abortion as a tool for resisting traditional roles and facilitating new ones.[129]

The same was seen in European jurisdictions, with courts beginning to follow this new biological truth. Barbara Duden notes how nineteenth-century German court records capture the tension between old ways of knowing and the new biological framework. Before this point, 'the situation had been reversed; since antiquity only a woman's statement that she had quickened had provided the physician with a solid indication to predict an impending birth after due time'.[130] Duden interprets the 'epistemological, psychological, and social' demise of quickening as imbricated in the cultural moves whereby women's interior bodies become part of public discourse in medical, legal and administrative realms, while at the same time the 'female exterior' – her place in the world – becomes scientifically proscribed to the private realm:

> On the one hand, it is the newly discovered naturalness of domesticity, motherhood, domestic work, familial sociability, the need for protection, and marital dependency that places women in the 'private realm' in law, education, and ethics. On the other, science uncovers and professionals mediate her womb as a public space. Her flesh becomes the public stage whose proceedings are of immediate interest to the state and the body politic, to public hygiene and the church and also to the husband.[131]

The scientific 'fact' of the presence of life from the point of conception therefore gained its facticity by its mobilization and instrumental insertion into medical and legal networks.[132] John Keown argues that anti-abortion provisions from Lord Ellenborough's Act until 1861 were influenced by the

[129] Ibid., 25.
[130] B. Duden, 'Quick with Child: An Experience That Has Lost Its Status' (1992) 14 *Technology in Society* 335–344 at 341.
[131] Duden, 'Quick with Child', 335–336.
[132] B. Latour, *Science in Action: How to Follow Scientists and Engineers through Society* (Cambridge, MA: Harvard University Press, 1987).

elite regular practitioners who 'relentlessly urged the need for suppression by the law of a practice that threatened fetal and maternal welfare but also the interests of their profession'.[133] As Latour argues, a proposition – here a scientific claim regarding foetal life – is not simply a claim or a statement. It involves articulating a body into a new set of arrangements or relations.[134] In this context, the scientific proposition articulates the pregnant body into a different set of (related) medical and legal relations. At the same time, a particular foetal identity and female reproductive body and subject emerge. These complex and shifting discourses overlay the material body, making it intelligible and determining how it is lived. As Grosz writes:

> By 'body' I understand a concrete, material, animate organization of flesh and organs, nerves, skeletal structure, which are given a unity, cohesiveness, and form through the psychical and social inscription of the body's surface. The body is, so to speak, organically, biologically 'incomplete'; it is indeterminate, amorphous, a series of uncoordinated potentialities that require social triggering, ordering, and long-term 'administration'.[135]

Barbara Duden similarly observes that 'science and technology filter and shape what we sense and experience'.[136] She goes on more fully and autobiographically to state:

> Women of my generation now look at their insides with medical optics that create scientific facts. The remnant of quickening is at best a feeble reminder of what a woman once knew. During the 1980s it thus became increasingly impossible to distinguish between separate spheres of the private and the public. Today not only the authorities ... but also the woman herself, discovers her child – not through quickening, but by recognizing it as a public fact.[137]

This section has focused on the legal life and death of quickening. This provides a means of exploring how we might best understand and articulate the dynamic nature of legal embodiment. It foregrounds the historically and culturally specific nature of the disciplinary discourses and institutional claims that are played out in the legal domain, and therefore the contingency of the 'imaginary anatomies' in relation to which

[133] Keown, *Abortion, Doctors, and the Law*, 49. [134] Ibid.
[135] E. Grosz, *Space, Time and Perversion: Essays on the Politics of Bodies* (New York: Routledge, 2018), 104.
[136] Duden, 'Quick with Child', 335. [137] Ibid., 343.

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embodiment is crafted and experienced.[138] While the focus has been the legislative 'life course' of the quickening doctrine, it is worth acknowledging the ongoing and developing life of the foetus in legal, regulatory and professional discourses. In the decades that saw in the twentieth century, 'embryology became a modern science, obstetrics became a profession, . . . birth control became a movement, eugenics became a cause, and prenatal care became a policy'.[139] Each of these saw a shifting and contested understanding of foetal identity, with 'scientific racism, the regulatory state, and professionalization'[140] themes that shaped and emerged within these various 'fetal meanings'[141] and which in turn mediated women's experience of pregnancy and embodiment.

In terms of the medical profession, having effectively campaigned to extend the criminal prohibition of abortion in the nineteenth century, the beginning of the twentieth century saw medical elites campaign to extend their lawful jurisdiction into the terrain previously occupied by their competitors.[142] *R.* v. *Bourne* [1938] marked the conclusion of a successful campaign to see the criminal law entrench exceptions to the statutory prohibition on abortion, but only when the appropriateness of a termination was determined, and was subsequently performed, by a medic.[143] The only limit placed on medical discretion was the 'golden rule' – the requirement to seek a second opinion from another doctor.[144] As such, medicine had secured the right to define the legality and ethics of abortion, extending its domain into territory it had previously cleared of competing providers. With *Bourne*, the common law extension and protection of medical discretion provided the conditions for the reforms to come nearly three decades later with the Abortion Act 1967.[145]

The closing decades of the twentieth century saw embryo and foetal identity continue to be shaped by the shifting interplay of law, science and the work of professional ethicists. With the work of the philosopher Mary

[138] C. Waldby, 'Destruction: Boundary Erotics and Refigurations of the Heterosexual Male Body', in E. Grosz and E. Probyn (eds.), *Sexy Bodies and the Strange Carnalities of Feminism* (London: Routledge, 1995), 268.

[139] Dubow, *Ourselves Unborn*, 7. [140] Ibid., 36. [141] Ibid., 184.

[142] Thomson, *Reproducing Narrative*; Thomson, 'Abortion Law and Professional Boundaries'.

[143] [1938] 3 All ER 61. For a discussion of the case, see Thomson, 'Abortion Law and Professional Boundaries'; McGuinness and Thomson, 'Conscience, Abortion, and Jurisdiction'.

[144] Thomson, 'Abortion Law and Professional Boundaries', 204–205. [145] Ibid.

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Warnock and the enactment of the Human Fertilisation and Embryology Act 1990, the primitive streak emerged as a 'biological *and* ontological landmark' supposedly settling 'philosophical questions of when a human individual could be said to begin'.[146] As with earlier claims, significance and meaning has been talked into being, and these entities remain the product of the 'dynamic engagement between scientific theories, moral frameworks such as utilitarianism, and ... rhetoric'.[147] Moving into our 'embryo-strewn world of the 21st century',[148] Marie Fox has argued in the context of admixed embryos that understandings of embryos and foetuses remain fluid and contingent and a means through which science and other disciplines continue to enact the human.[149]

These are the historic and contemporary contexts within which 'foetal heartbeat' laws are located. This mandates that we do not simply debate 'good' and 'bad' science. Rather, we must attend to the social and political nature of scientific knowledge claims ('good' and 'bad') that come to shape embodied subjects. This is central to the understanding and definition of legal embodiment promoted here. In Section 4, I return to the 'foetal heartbeat' legislation. I further explore the embodied effects of this legislation, acknowledging the gendered impacts of this entwining of scientific and legal discourses. To do this, I address the wider context of increasing 'speech and display' provisions in the United States,[150] and how addressing these in the context of rhetoric and its materiality might advance further our understanding of legal embodiment.

4. Science, Law and Material Rhetoric

On the introduction of 'foetal heartbeat' legislation in Ohio, Attorney General Dave Yost welcomed the opportunity to defend his state's law

[146] Wilson, 'What Can History Do for Bioethics', 221.

[147] Ibid. See also D. Wilson, *The Birth of British Bioethics* (Manchester: Manchester University Press, 2014).

[148] S. Franklin, 'The Cyborg Embryo: Our Path to Transbiology' (2006) 23 *Theory, Culture & Society* 167–187 at 168.

[149] M. Fox, 'What Is Special about the Human Body?' (2015) 7 *Law, Innovation and Technology* 206–230.

[150] For a general discussion of the development of these provisions see, J. A. Robertson, 'Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis' (2011) 14 *University of Pennsylvania Journal of Constitutional Law* 327–390; M. Kreutzfeld, 'Avert Your Eyes: The Ethical and Constitutional Injustice of Pre-Abortion Mandatory Ultrasound Laws' (2017) 21 *Journal of Gender, Race and Justice* 201–237.

and challenge *Roe* v. *Wade*: 'In the last 46 years, the practice of medicine has changed ... Science has changed. Even the point of viability has changed. Only the law has lagged behind.'[151] This 'pro-life is pro-science' political strategy has its origins in the early debates around quickening. While it is important to challenge the legitimacy of the science that is mobilized to support such legislative moves, two points need to be made. First, this cannot be done at the expense of problematizing the understanding of science that underpins both sides in the debates. While many contest the validity of the science, both sides generally rely on a model of science as objective truth, rarely considering that facts – whether generated by Shildrick's Renaissance anatomists or today's epigeneticists – are not severable from the context of their fabrication.[152] This broader context is essential to understanding embodiment as a socio-political practice and how law, science and gender interrelate in processes of embodiment. Second, engaging with science can be read as supporting the biomedical lens through which we regulate, view and experience reproduction. This potentially reinscribes the epistemic violence done by early campaigning physicians and the emerging embryologists. Thus, while it is necessary to challenge the misuse of science, it is also essential to work to uncouple reproduction from a monopolistic scientific gaze.[153]

Model legislation refers to 'fetal cardiac activity' as a marker of 'an unborn human individual'.[154] The sponsor and supporters of Georgia HB 481 asserted that detection of a 'heartbeat' was a 'legally significant and medically sound' indicator of life, 'pregnancy viability' and personhood. These assertions were repeatedly described as 'common sense'[155] and warrant further consideration. In clinical practice, the detection of cardiac activity is used as a marker of the health of the pregnancy and to reassure the pregnant woman and any partner that the pregnancy is developing. However, the legislation uses this as a point of moral and potentially legal significance, deliberately drawing on and obscuring existing understandings of viability. Legislative findings quote the American College of Obstetricians and Gynecologists 2015 guidelines that identify ultrasound as 'the preferred modality to verify the presence of a viable intrauterine

[151] S. Jaffe, 'Legal Battles over Abortion Heat Up in the USA' (2019) 393 *The Lancet* 1923–1924 at 1924.
[152] Latour, *Science in Action*.
[153] I am grateful to Isabel Karpin for emphasizing this point.
[154] See, for example, the model legislation provided at www.f2a.org/
[155] Evans and Narasimhan, 'A Narrative Analysis of Anti-Abortion Testimony', 4.

gestation'.[156] These guidelines refer to pregnancy loss and miscarriage and are concerned with a viable pregnancy rather than a pregnancy that is viable outside the uterus, the accepted meaning within abortion jurisprudence and wider public discourse.[157] It is important to highlight the co-option or appropriation of viability in this way. It is possible, after all, that this strategy may contribute to the unsettling and eventual recalibration of how viability is understood. This would obviously have a significant impact on abortion politics and care. Evans and Narasimhan note that such appropriation was a key tactic used by Georgia HB 481 advocates:

> [A]nti-abortion legislators and community members oversimplified complex concepts and directly appropriated language relating to viability, defining death, and child development. They reduced complicated scientific processes, medical experiences and decisions into extremely simple terms. Use of 'heartbeat' was deliberate evoking popular knowledge, for example, hearing fetal heart tones using a Doppler ultrasound; advances in sonography were also used to advocate for increased ability to see and hear the presence of 'life' during pregnancy.[158]

In focusing on the present misuse of science, there is a danger that it leaves the question of viability as a legally and morally significant 'marker' unproblematized. Focusing on the appropriation of viability does nothing to draw attention to the culturally and historically contingent and arbitrary nature of viability itself. As with quickening, viability provides an example of how the meaning and significance of bodies and their processes emerge within professional and institutional contexts.[159] Further, the use of 'viability' is a strategy that works in concert with reference to 'heartbeat', with the immediate and visceral responses that this word triggers. As Representative Ed Setzler, sponsor of Georgia HB 481 asserted: 'Protecting life in the womb with a human heartbeat is what science, law, and human conscience would suggest.'[160] As Whitney Arey writes: 'the language is very intentional; it uses the heart beat as a universal "sign of life" to draw on and ultimately establish a shared legal understanding of what it means to be "alive".'[161]

[156] Shepherd, 'Fetal Heartbeat Bill Gets the Science and the Law Wrong'. [157] Ibid.
[158] Evans and Narasimhan, 'A Narrative Analysis of Anti-Abortion Testimony', 4.
[159] For an example in a related context, see S. Hennette-Vauchez, 'Words Count: How Interest in Stem Cells Made the Embryo Available: A Look at the French Law of Bioethics' (2009) 17 *Medical Law Review* 52–75.
[160] Shepherd, 'Fetal Heartbeat Bill Gets the Science and the Law Wrong'.
[161] Arey, 'Web Roundup'.

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Notwithstanding the caveats noted, it is, nonetheless, important to state that at six weeks the foetus is 3–4 millimetres long. It is beginning to form very immature neurological and cardiovascular systems. At this point there is no recognizable heart or cardiac system. What new technology is able to detect is a group of cells with electrical activity. This activity starts with the development of the foetal pole, the first sign of a developing embryo.[162] So, rather than a 'heartbeat' we might instead understand it as 'a little flutter in the area that will become the future heart' and, indeed, a range of other organs.[163] The 'foetal heartbeat' underpinning these interventions is no more than rhythmic electrical impulses 'helping to encourage the development of an organised vasculature and circulatory system – a prerequisite for future viability but not sufficient alone'.[164] In response to the appropriation and distortion of language, some refer to 'foetal cardiac activity' or 'foetal pole cardiac activity'. Others sidestep the misrepresentation of science, and indeed the medicalization of the abortion debate, referring instead to 'six-week abortion bans'.

Since the early embryologists, technology has been instrumental in the politics of foetal identity and it is technological developments that have enabled the 'foetal heartbeat' to join 'the growing use of sonogram technology as an anti-abortion weapon'.[165] As Sarah Horvath from the American College of Obstetricians and Gynecologists states: 'What's really happening at that point is that our ultrasound technology [is now] able to detect activity in a rudimentary group of cells.'[166] Here we have a very familiar mixing of (medical) technology with moral and legal claims. Feminist scholars have long considered the impact of technologies that visualize the foetus.[167] This has ranged from anatomical drawings of foetal

[162] Ibid.

[163] Dr Saima Aftab, Fetal Care Center, Nicklaus Children's Hospital, Miami in R. Rettner, 'Is a "Fetal Heartbeat" Really a Heartbeat at 6 Weeks', *Live Science*, 17 May 2019.

[164] A. Rogers, '"Heartbeat" Bills Get the Science of Fetal Heartbeats All Wrong', *WIRED*, 14 May 2019.

[165] Robertson, 'Abortion and Technology', 332.

[166] As Horvath continues: 'I do think there's a deliberate conflation of terms going on in legislation in order to try to co-opt the science, or at least the scientific language. These bans are really just arbitrarily chosen points in time in a pregnancy that are strictly there because they want a complete ban on abortion care.' Rogers, '"Heartbeat" Bills'.

[167] As Featherstone writes: 'Feminist historians, theorists, ethicists and sociologists have long suggested that the foetus is not a universal, "natural", biological figure. Historically, it had to be "discovered", and, most importantly, have meaning rendered to this discovery. Technology has marked a key shift here: if the foetus could once only be felt and

development circulating at the beginning of the nineteenth century,[168] through Lennart Nilsson's famous *Life* photographs of the seemingly free-floating foetus – 'Drama of Life Before Birth' – in 1965,[169] to contemporary sonograms.[170] This criticism details the erasure of the woman and the decontextualizing of pregnancy and its consequences.[171] Communications scholar Amanda Edgar has extended this analysis in her consideration of 'foetal heartbeat' technologies. While she addresses 'speech and display' laws, her analysis of this sonic act is applicable across its different deployments.[172] Edgar compellingly argues that the phenomenon can be understood as rhetoric. She draws on the work of Michael McGee and others who explore the materiality of rhetoric; the way it acts like a force, pushing against us like 'air and water'.[173] Such attention to material rhetoric can support the renewed interest in critical rhetorical analysis in socio-legal studies.[174]

imagined, now the foetus has been intensely scrutinised through visual and audio media. Such "visions" were, of course, mediated, even distorted, through the lens of culture, but were nonetheless naturalised and seemingly made coherent'. Featherstone, 'Becoming a Baby?', at 459.

[168] B. Duben, 'The Fetus on the "Farther Shore": Towards a History of the Unborn', in L. M. Morgan and M. W. Michaels (eds.), *Fetal Subjects, Feminist Positions* (Philadelphia: University of Pennsylvania Press, 1999).

[169] R. P. Petchesky, 'Fetal Images: The Power of Visual Culture in the Politics of Reproduction' (1987) 13 *Feminist Studies* 263–292; C. A. Stabile, 'Shooting the Mother: Fetal Photography and the Politics of Disappearance' (1992) 28 *Camera Obscura* 178–205.

[170] L. M. Mitchell, *Baby's First Picture: Ultrasound and the Politics of Fetal Subjects* (Toronto: University of Toronto Press, 2016); J. Roberts, *The Visualised Foetus: A Cultural and Political Analysis of Ultrasound Imagery* (London: Routledge, 2016).

[171] Karpin, 'The Uncanny Embryos'.

[172] It is also important to acknowledge that moves to restrict access to abortion care is far from an exclusively US or Anglo-American preoccupation. A recent ruling by Poland's constitutional tribunal and subsequent high-profile public protests demonstrate this. They also illustrate the different ways in which discourses regarding foetal identity may be mobilized and should be subject to an analysis for their embodied affect. On the Polish ruling, see: 'Poland Rules Abortion Due to Foetal Defects Unconstitutional', *The Guardian*, 22 October 2020, www.theguardian.com/world/2020/oct/22/poland-rules-abortion-due-to-foetal-defects-unconstitutional

[173] M. C. McGee, 'A Materialist's Conception of Rhetoric', in R. E. McKerrow (ed.), *Explorations in Rhetoric: Studies in Honor of Douglas Ehninger* (Glenview, IL: Scott, Foresman, 1982), 26.

[174] See J. Harrington, L. Series and A. Ruck-Keene, 'Law and Rhetoric: Critical Possibilities' (2019) 46 *Journal of Law and Society* 302–327; J. Harrington, *Towards a Rhetoric of Medical Law* (London: Routledge, Glasshouse, 2017).

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Edgar draws attention to North Carolina's Woman's Right to Know Act, which required women seeking abortion care to undergo a sonogram, 'foetal heartbeat' auscultation, and listen to a state-mandated statement by the physician who would perform the procedure. The statute provided that the statement must include: 'a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs'.[175] The statement was to be rendered in the physician's 'own voice'. A number of federal courts have found that such provisions violate the First Amendment because they 'compel ideological speech'.[176] Edgar argues that:

> The speech is designed not to stand on its own, but instead to work in tandem with sonogram imagery and heartbeat sounds. The physician's narration is layered over the sounds of the Doppler heartbeat reading and sonically produced fetal imagery. As the rhetoric of the state is forced from the physician's mouth, it leaks into the fetal and maternal sounds, all of which are saturated with the state's ideological meaning.[177]

For Edgar, the sonic 'fetal heartbeat', sonogram and mandated speech, act as material rhetoric with 'real consequences for bodies and environments'.[178] She explains the materiality of rhetoric by turning to law. As she writes, abortion law rhetoric materially impacts on the bodies of women, 'who must either carry fetuses to term or obtain illegal, often dangerous abortions'.[179] Returning to the political mobilization of the 'foetal heartbeat', Edgar argues that coupled with the other aspects of 'speech and display' provisions, sonic abortion rhetorics 'push against women's bodies, working not only to restrict those bodies from some medical treatments but also to limit the ways those bodies are understood in popular culture'.[180] Edgar's analysis is provocative and persuasive.[181] Yet the degree to which this material rhetoric 'pushes against' women's bodies can be extended. While she identifies the impact on popular culture,

[175] *Stuart* v. *Loomis* MDNC 1:11-CV-804 (2014), para. 2.
[176] Kreutzfeld, 'Avert Your Eyes', 203.
[177] A. N. Edgar, 'The Rhetoric of Auscultation: Corporeal Sounds, Mediated Bodies, and Abortion Rights' (2017) 103 *Quarterly Journal of Speech* 350–371 at 360.
[178] Ibid., 351. [179] Ibid. [180] Ibid.
[181] In this context, it is interesting to note John Robertson's reference of sonograms as 'an anti-abortion cudgel'. Robertson, 'Abortion and Technology', 346.

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this is indivisible from women's embodied experiences of reproduction, which are formulated in response to 'imaginary anatomies' in circulation.[182] That is to say, we experience our embodiment in relation to the bodies imagined and projected within culture – whether that is scientific, legal or popular – in a particular time and place.[183]

The interplay of technology, biomedical discourse, law and popular culture is important. Changing foetal identities are generated at the intersection of these overlapping fields. As Lisa Featherstone writes, 'changing conceptualisations of the foetus are not only dependent on technologies but rather on complex social, cultural, political and economic interactions, grounded in distinct times and places'.[184] Yet we must recognize that biomedicine and its technologies have a particular weight. While they are partial and incomplete, they shape 'how the self is made "real"'.[185] The heightened impact of biomedical discourse comes with added responsibility. The mobilization of the 'foetal heartbeat' has achieved purchase in popular, political and academic realms.[186] This is no doubt due to the rich significance this purposefully draws upon. As such, it is incumbent on all, but particularly those in biomedical fields, to exercise care. It is regrettable, therefore, that influential and globally read journals such as the *British Medical Journal* use 'foetal heartbeat' uncritically when reporting on these legislative interventions. In so doing, they risk validating the erroneous and deliberately misleading claims that provide the political power behind these campaigns.[187] While Barbara Duden is correct to remind us that 'words forge meaning',[188] we should also note that they forge lived experience and political possibility.

[182] Waldby, 'Destruction'. [183] Thomson, 'A Tale of Two Bodies'.

[184] Featherstone, 'Becoming a Baby?', 451.

[185] Lock and Nguyen, *An Anthropology of Biomedicine*, 284.

[186] For an example of academic pro-'foetal heartbeat' commentary, see D. F. Forte, 'Life, Heartbeat, Birth: A Medical Basis for Reform' (2013) 74 *Ohio State Law Journal* 121–148.

[187] See, for example: O. Dyer, 'Georgia Limits Abortion to Six Weeks and Eyes Supreme Court', *BMJ*, 2 April 2019; O. Dyer, 'The US State of Georgia's Majority Republican Legislature Has Passed a Bill Outlawing Abortions once a Fetal Heartbeat Can Be Detected', *BMJ*, 2 April 2019; A. R. A Aiken, 'Erosion of Women's Reproductive Rights in the United States', *BMJ*, 5 July 2019; A. R. A. Aiken, 'In March 2019, Mississippi Enacted Legislation That Would Prohibit Abortion once a Fetal Heartbeat Can Be Detected', *BMJ*, 5 July 2019.

[188] Duden, 'Quick with Child', 338.

5. Conclusions

In responding to the developing 'foetal heartbeat' legislation, legal academic Mary Ziegler observed: 'Over the past few decades, the abortion wars have become as much a fight about science and medicine as they are about the law and the Constitution.'[189] This is a common and incomplete understanding of the development of abortion law and politics. Since the early nineteenth century, elite medical professionals have been instrumental in the development of abortion law and therefore the social and political contestation that has followed. This has continued.[190] Early campaigning physicians harnessed claims regarding embryonic and foetal life to assert their intellectual and ethical superiority over competing providers and therefore secure legal privileges. As Lynn Morgan writes, embryos get 'recruited as evidence' and 'discursively produced within particular social dramas'.[191] The physicians' instrumental mobilization of abortion saw the female body corporealize the social and political anxieties of the day, including those that centred on women's place in society.[192] Early recruitment of the foetus and abortion law in the regular physicians' professionalization project has had an enduring impact on how pregnancy and abortion care is understood and experienced. As Jenni Millbank observes, discourses of foetal life 'cast a long shadow over procreative practices' and women's embodied experiences.[193]

In exploring shifting jurisprudential 'fetal imaginings',[194] this chapter has stressed how knowledge claims are contingent and shaped by the specific milieu within which they emerge. An important aspect of the milieu is gender, which structures the context within which bodies, and the technologies that make them intelligible in particular ways, are imagined and created. Bodies and subjects are also always shaped by political economy; here the emergence of a highly gendered and stratified

[189] Shepherd, 'Fetal Heartbeat Bill Gets the Science and the Law Wrong'.

[190] This was the case throughout the nineteenth and twentieth century, see Keown, *Abortion, Doctors, and the Law*; Thomson, *Reproducing Narrative*; Thomson, 'Abortion Law and Professional Boundaries'; McGuinness and Thomson, 'Medicine and Abortion Law'; McGuinness and Thomson, 'Conscience, Abortion, and Jurisdiction'.

[191] Morgan, 'Embryo Tales', 263.

[192] Siegel, 'Reasoning from the Body'; Thomson, *Reproducing Narrative*.

[193] J. Millbank, 'Exploring the Ineffable in Women's Experiences of Relationality with Their Stored IVF Embryos' (2017) 23 *Body & Society* 95–120.

[194] Dubow, *Ourselves Unborn*, 6.

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professional society. As Kane Race states, 'markets, facts and subjects are mutually constitutive, processual and emergent'.[195] These elements articulated here as scientific claims regarding embryonic and foetal life were necessary for the development of a medically dominated market for health. These claims were also necessary for a medicalized female subject who would become a significant and enduring focus for that expertise and market.

Shifting medical claims regarding the embryo and foetus changed the meaning and significance of quickening. This impacted not only statutory provisions but also women's experience of reproduction and embodiment. Quickening moved from 'that experience of movement or animation which was the woman's first and primary perception of foetal motility, to simply one and even a somewhat less important event along a scientifically mediated continuum'.[196] Medical claims shifted the circulating imaginary bodies (foetal and pregnant) in relation to which women's embodiment and lived experience is structured. Thus, legal and biomedical discourses entwined with one another, shaping gender and embodiment, and constructing a particular relationship between women and the state. As already noted, knowledge claims become sticky when they enter legal discourse and practice, and these claims have continued to shape lived experience and the regulation of reproduction. This point is worth stressing as Texas SB8 is considered by the Supreme Court. It is likely that much will focus on the unprecedented legislative scheme designed to prevent judicial scrutiny,[197] and the standing of *Roe* v. *Wade*. This will leave the newly figured six-week foetus with its 'heartbeat' – an imaginary anatomy – circulating in public discourse.

Addressing changing legal conceptions of the foetus, the purpose has been to develop a robust account of legal embodiment. This has built on recent socio-legal work that explores the institutional and affective dimensions of embodiment. In this chapter, I have looked at the role of law in constructing bodily imaginaries in relation to which embodiment is formulated and experienced.[198] As Grosz argues, while the body is a material

[195] K. Race, '"Frequent Sipping": Bottled Water, the Will to Health, and the Subject of Hydration' (2012) 18 *Body & Society* 72–98 at 92.
[196] Duden, 'Quick with Child', 335.
[197] www.justice.gov/opa/pr/justice-department-sues-texas-over-senate-bill-8.
[198] Gatens, *Imaginary Bodies*.

and 'animate organization of flesh and organs', it is only made cohesive through social inscription (including in biomedical, legal and popular discourses) and the psychical work in relation to this inscription.[199] The focus on legal embodiment has addressed the interplay of biomedical and legal discourses and how these intertwine with gender to provide an account of foetal and reproductive bodies. This work has sought to denaturalize these bodies and the analysis has stressed the need to interrogate biomedical claims that are made in the legal domain. As Donna Haraway argues, such knowledge claims can be understood as 'frozen moments' of the 'fluid social interactions constituting them, but they should also be viewed as instruments that enforce meanings'.[200] In both regards, gender should be understood as a normative order that provides a pervasive and inescapable context within which science asks its questions, designs its research and interprets its results. This also allows us to understand how – through the body – law, gender and the discourses of science together constitute legal subjects, hierarchies and identities.

[199] Grosz, *Space, Time and Perversion*, 104.

[200] D. J. Haraway, *'A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century' in Simians, Cyborgs and Women: The Reinvention of Nature* (New York: Routledge, 1991), 164.